92-1280

Supreme Court, U.S.
FILED
JAN 27 1993
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

1993 Term

BETTY ANN LAWS

Petitioner

v.

DEWEY WHITE

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

David D. Haynes
140 Cherry Street
Terre Haute, IN 47807
Tele: (812) 232-3299
Attorney for Petitioner

Graphics LTD., Indianapolis, IN 46202

QUESTION PRESENTED FOR REVIEW

In a § 1983 action, should the plaintiff be entitled to all reasonable inferences from available facts *including* a consideration of the overall atmosphere and attitude of a town government, its officials, and those in power who may also be defendants in other actions filed by the plaintiff.

PARTIES TO THE ORIGINAL PROCEEDINGS

A. Petitioner-Original Plaintiff (Appellant in Seventh Circuit):

Betty Ann Laws.

B. Respondent-Original Defendant (Appellant in Seventh Circuit):

Dewey White.

C. References:

Hereinafter the Petitioner shall be referred to as "Laws" and the Respondent shall be referred to as "White".

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i
PARTIES TO THE ORIGINAL PROCEEDING ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
OPINIONS BY OTHER COURTS 1
JURISDICTIONAL STATEMENT 2
APPLICABLE STATUTORY PROVISIONS 2
A. 42 U.S.C. § 1983
B. First Amendment, U.S. Constitution
C. Fourteenth Amendment, U.S. Constitution
D. Fed. R. Civ. P. 56
STATEMENT OF THE CASE 5
ARGUMENT 7

APPENDIX

The decision of the U. S. Court of Appeals for Seventh Circuit dated September 29, 1992 ..... A-1

The ruling of the U. S. District Court on the Motion for Summary Judgment dated May 30, 1991. (This ruling incorporates the Court's discussion contained in an earlier ruling which is also provided herewith) A-8

The ruling of the district court on the earlier Motion for Summary Judgment dated April 24, 1990 ..... A-28

TABLE OF AUTHORITIES

CASES — *Page*

Adickes v. Kress, 398 U.S. 144, 90 S.Ct. 1548 ..... 8, 9, 10
Bart v. Telford, 677 F.2d 622 (7th Cir. 1982) 8

STATUTES

42 U.S.C. § 1983 6

28 U.S.C. § 1254 2

Constitution of the United States
First Amendment 6
Fourteenth Amendment 6

No.

IN THE

Supreme Court of the United States

1993 Term

BETTY ANN LAWS

Petitioner

v.

DEWEY WHITE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BY OTHER COURTS

Laws v. White, unpublished (Seventh Circuit, September 29, 1992) (A-1 to A-7)

Laws v. Rockville Town Board of Trustees, et al.,

_____ Fed.Supp. _____ (U.S. District Court, Southern District, Indiana, April 4, 1989) (A-8 to A-14)

JURISDICTIONAL STATEMENT

Laws seeks the review of the decision of the United States Court of Appeals for the Seventh Circuit dated September 29, 1992 whereby it affirmed the decision of the United States

District Court for the Southern District of Indiana in which the District Court had granted summary judgment in favor of White.

On December 18, 1992, Justice Stevens granted Laws an extension of time within which to file her petition for writ of certiorari to and incuding the 27th day of January, 1993.

Jurisdiction of the federal courts is invoked pursuant to the provisions of 28 U.S.C. § 1343 (3) and (4). This is a suit authorized by 42 U.S.C. § 1983 to redress the deprivation of rights, privileges and immunities secured by 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the Constitution of the United States.

The summary judgment rendered in the district court contained sufficient language as to "finality" to provide Laws an appeal as a matter of right pursuant to 28 U.S.C. § 1291.

With the September 29, 1992 decision by the Court of Appeals affirming the summary judgment ruling, Laws files her petition for writ of certiorari and the jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254.

APPLICABLE STATUTORY PROVISIONS

A. 42 U.S.C. § 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

B. Constitution of the United States: Amendment I.

Freedom of religion, speech and press; peaceful assemblage; petition of grievances.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

C. Constitution of the United States: Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.***

D. Fed. R. Civ. P. 56 Summary Judgment:

(a) For Claimant. A party seeking to recover upon a claim, counter-claim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judmgent in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers

to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judg-

ment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

Laws seeks redress from the arbitrary and capricious actions of White and other defendants, who have acted in their official capacity under color of state law with personal or private motive to deprive Laws of her property and substantive rights enjoyed under the U. S. Constitution, and including her rights to due process and equal protection under the Fourteenth Amendment. Specifically, Laws complains that White and other defendants have abused their power in a deliberate campaign of harassment to thwart and penalize Laws who has exercised her rights under the First Amendment to petition the government for redress of grievances. Laws also complains that White has intentionally abridged her privileges and immunities and denied her equal protection under the Fourteenth Amendment. This complaint seeks correction of these unlawful practices, and compensatory and punitive damages.

Jurisdiction of the U.S. District Court is invoked pursuant to

the provisions of 28 U.S.C. § 1343 (3) and (4). This being a suit authorized by 42 U.S.C. § 1983 to redress the deprivation of rights, privileges and immunities secured by 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the Constitution of the United States.

At all times relevant to the issues raised by her complaint, Laws was a resident of the town of Rockville, living in a log home situated on Primrose Lane. She lived adjacent to properties owned by the McKinneys with whom she had a variety of disputes primarily related to violations of zoning ordinances in the placement of mobile homes.

Laws attempted to seek the enforcement of the zoning laws, and she was met with resistance or disinterest by town officials and was eventually forced to pursue her remedies in the state courts. She was ultimately successful after trial and appeal, yet the town government continued to be slow in enforcing its laws.

The action filed in state court by Laws included the McKinneys and White as defendants. At that time, White was a member of the town board. He later assumed the responsibilities as chief of police while the zoning case was pending and it was during this time that Laws sought to take photographs of her neigbors' properties in preparation and pursuit of her lawsuit. On two separate occasions, Laws was confronted while taking photographs by police officers of the town under the direct supervision and authority of White. Although these two officers and White admit that there was no legal prohibition to the taking of these photographs, they exercised the power of their authority and uniform in harassing and inhibiting Laws.

As chief of police, and as a defendant in the lawsuit for which Laws was seeking information and evidence, White was directly responsible for the actions of his officers and he is responsible under § 1983 for their violation of her statutory and constitutional rights.

Evidence before the district court in regard to these inci-

dents include the affidavits of the two police officers, Jack Shannon and Charles Bollinger, and the affidavit of Dewey White. These documents were included in the record on appeal as is the affidavit of Laws which was attached to her response to White's Motion for Summary Judgment.

Laws initiated her action to enforce the zoning ordinances on May 29, 1981 and at that time White was a member of the town board. On April 12, 1982, White resigned from the town board and became chief of police. Four months later, while White served as police chief and continued as a defendant in the action filed by Laws, Officer Charles Bollinger confronted Laws regarding the taking of pictures and insisted that she stop. Two months later, Laws was confronted by Officer Shannon and again told that she should stop taking pictures.

Both police officers were under the supervision and authority of White as chief of police. The legal actions taken by Laws were of common knowledge among town officials and a subject of discussion at various town meetings, both formal or informal, in which White was a regular participant.

ARGUMENT

Laws seeks the review of a summary judgment granted in favor of White by the district court and affirmed by the Court of Appeals. Laws original action involves a series of incidents which occurred during and subsequent to her efforts to force the town government of Rockville, Indiana to provide those protections available against the zoning violations which were occurring near her residence. In response to Laws efforts to disclose the failings of the town government in the application of its laws and ordinances, Laws became the victim of a scheme and conspiracy against which she had to speak out.

Among the principal characters within the Rockville government at this time was police chief White, who was also a former member of the town board and defendant in the formal action which Laws had initiated to enforce the local zoning ordinance.

The action which Laws filed against White and others suggest that there was a common scheme or plan, a policy, among those who were the subject of Laws' criticism to make life uncomfortable for her. As to White specifically. Laws has suggested that the actions of two police officers, each on separate occasions, in coming to Laws residence to confront her about taking pictures of the zoning violations in existence on neighboring properties, was a part of the overall efforts by those in town government to make life miserable for Laws.

Both the district court and the court of appeals discounted Laws suggestion that White was such an intregal part of the workings of town government that his feelings and animosity towards Laws was manifested in the actions of those officers under his control. Laws believes that the various incidents of which she complains cannot be considered individually, in a vacuum. A comprehensive understanding of the atmosphere and attitude which Laws was required to face during her days in Rockville more clearly indicates that these various problems were not mere coincidence and were the result of a common plan or policy.

The district court had previously considered a motion for summary judgment filed by all of the defendants to Laws' action and applied the approach suggested in *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982). In its later decision concerning only White, the district court contradicted its earlier ruling and application of *Bart v. Telford*, by extracting the specific instances involving the actions of the police officers under White's control from the overall picture. Laws contends that the ruling of the Court of Appeals for the Seventh Circuit is inconsistent and contradictory to prior rulings of this court, specifically *Adickes v. Kress*, 398 U.S. 144, 90 S.Ct. 1548.

The relationship which Laws contends existed between officers Bollinger and Shannon, and White is a reasonable inference from the facts available, more so than the conspiracy

alleged in *Adickes v. Kress*, 398 U.S. 144, 90 S.Ct. 1548, between a restaurant owner and local police:

> In moving for summary judgment, Kress argued that "uncontested facts" established that no conspiracy existed between any Kress employee and the police. To support this assertion, Kress pointed first to the statements in the deposition of the store manager (Mr. Powell) that (a) he had not communicated with the police, and that (b) he had, by a prearranged tacit signal, ordered the food counter supervisor to see that Miss Adickes was refused service only because he was fearful of a riot in the store by customers angered at seeing a "mixed group" of whites and blacks eating together. Kress also relied on affidavits from the Hattiesburg chief of police, and the two arresting officers, to the effect that store manager Powell had not requested that petitioner be arrested. Finally, Kress pointed to the statements in petitioner's own dispositon that she had no knowledge of any communication between any Kress employee and any member of the Hattiesburg police, and was relying on circumstancial evidence to support her contention that there was an arrangement between Kress and the police.
>
> Petitioner, in opposing summary judgment, pointed out that respondent had failed in its moving papers to dispute the allegation in petitioner's complaint, a statement at her deposition, and an unsworn statement by a Kress employee, all to the effect that there was a policeman in the store at the time of the refusal to serve her, and that this was the policeman who subsequently arrested her. Petitioner argued that *although she had no knowledge of an agreement between Kress and the police, the sequence of events created a substantial enough possibility of a conspiracy to allow her to proceed to trial*, especially given the fact that the noncircumstntial evidence of the conspiracy could only come from adverse witnesses. Further, she submitted an affidavit specifically disputing the manager's assertion that the situation in the store at the time of the refusal was "explosive," thus creating an issue

> of fact as to what his motives might have been in ordering the refusal of service.

Adickes, at pages 1606-1608, (emphasis added).

Laws is entitled to offer her story to a jury. If inferences can be drawn from the facts provided, she will be successful. If not, White is absolved. However, Laws has described in her complaint, her affidavit, and her depositions an atmosphere which suggests a concerted movement against her which has as one of its central characters one Dewey White, a man who wore several hats during the time Laws was suffering the hardships created by the Rockville town government. Laws' claim against White should survive summary judgment as did the claim of *Adickes:*

> "We think that on the basis of this record, it was error to grant summary judgment. As the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material is lodged must be viewed in the light most favorable to the opposing party. Respondent here did not carry its burden because of its failure to foreclose the possiblity that there was a policeman in the Kress store while petitioner was awaiting service, and that this policeman reached an understanding with some Kress employee that petitioner not be served.

Adickes v. Kress, at page 1608.

It may be impossible for Laws to specifically prove that officers Bollinger and Shannon acted on direct (or indirect) orders from White in confronting and harassing Laws while she was taking photographs and gathering evidence in pursuit of her legal action. However, it should be within the realm of a jury to view and consider the overall functions of Rockville town government, White's involvement in that government (both past and present), and to place the degree of importance which they deem appropriate on the fact that Laws was being hampered by police action in her efforts to gather information in a case pending against White. The mere existence of the

conflict of interest between White's role as a police chief and that of a defendant in an action being pursued by Laws lends itself to those inferences which might create an issue of fact so genuine so as to survive summary judgment.

When dealing with an alleged violation of a person's constitutional rights, the right to equal protection under the laws and the right to seek from the government redress from grievances, a plaintiff is entitled to all of those reasonable inferences that can be made from the available facts. To require Laws to prove a more direct command from White to his officers offers a protection to those in authority, acting under color of state law, which she may be unable to pierce.

Despite "open door" statutes and ordinances, it is common knowledge that many of the decisions and attitudes as to day to day policy and approach are developed in hallway conversations and such other informal settings that easily evade public scrutiny. It is difficult to understand why two police officers, on two separate occasions, would demand that Laws cease doing what she was legally entitled to do. The actions of the officers when coupled with the degree of White's involvement in her zoning suit raises a strong suspicion as to the direction offered these police officers and its source.

White was the proverbial "big fish in a small pond." He was very active in town government and had served in various capacities. As news may travel in a small town such as Rockville, the general feelings of those in power about Laws would have become such common knowledge that those under the authority of White acted on his feelings and attitudes toward Laws.

To deprive one of equal protection under the laws, whether those laws be state, federal, or local, or to intimidate and harass an individual by abusing authority and the uniform, every consideration must be given to allow these matters to be

heard, addressed, and for the total and complete understanding of the situation, the characters involved, and all interrelationships.

Respectfully submitted,

DAVID D. HAYNES
Attorney for Petitioner
140 Cherry Street
Terre Haute, IN 47807

Appendix

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
Submitted September 21, 1992*
September 29, 1992

Before

HON. WALTER J. CUMMINGS, CIRCUIT JUDGE
HON. RICHARD A. POSNER, CIRCUIT JUDGE
HON. DANIEL A. MANION, CIRCUIT JUDGE

BETTY A. LAWS, *Plaintiff-Appellant,* No. 91-2572 v. DEWEY WHITE, in his Official Capacity as Trustee of the Town Board of Rockville, as Chief of Police, and Individually, *Defendant-Appellee.*	Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division. 86 C 208 John D. Tinder *Judge.*

ORDER

In this case brought under 42 U.S.C. § 1983, plaintiff Betty A. Laws appeals from an adverse summary judgment. The

*After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Fed. R. App. P. 34(a); Cir. R. 34(f). No such statement having been filed, the appeal has been submitted on the briefs and the record.

district court granted summary judgment in favor of defendant Dewey White because it found no genuine issue of fact regarding White's involvement in the alleged police harassment of which Laws complained. On appeal, Laws argues that the district court erroneously denied her the reasonable inferences to which she was entitled as the non-moving party. We affirm.

I

In 1981, Laws filed suit in state court against her neighbors and officials of the town of Rockville, Indiana to enforce local zoning ordinances. White, a member of the town board at the time, was a named defendant. In April of 1982, while the suit was pending, White resigned from the board and was appointed chief of police. In the summer and fall of 1982, police officers Charles Bollinger and Jack Shannon confronted Laws while she was taking photographs of her neighbors' property to document her allegations of zoning violations. The officers told Laws to stop taking photographs because she was trespassing and she was bothering her neighbors. Laws apparently continued taking pictures in each case and in neither case did the officers interfere.

Laws filed suit under 42 U.S.C. § 1983 against Rockville officials, including White in both his individual and official capacities. In her Second Amended Complaint, Laws claimed that White

> harassed and intimidated [her] either directly or through his agents and employees and sought to prevent her from exercising her rights under the First Amendment and has violated her rights to due process and equal protection and has abridged her immunities under [the] First Amendment and Fourteenth Amendment.

R. Doc. 9, at 5.

White moved for summary judgment and submitted his affidavit along with affidavits from Officers Bollinger and Shannon. In his affidavit, White stated that he never ordered either

Ballinger, Shannon, or any other law enforcement officer to contact, confer with, or order Laws to cease taking pictures for evidence in any lawsuit or for any other purpose. He also denied personally ordering Laws to cease taking pictures.

The affidavits of Bollinger and Shannon are consistent with White's sworn statement. Bollinger stated that on August 16, 1982, he went to Laws' residence in response to a call received through the Sheriff's Dispatcher's Office, not in response to any orders from White. Laws' neighbors complained to Bollinger that Laws was standing in their yard taking pictures of them. He told Laws that if she were on the neighbors' property taking pictures of them, she would be trespassing. Bollinger also stated that, at the time he received the call, he was unaware of any lawsuit Laws had filed against the Town of Rockville, and that at no time did White or any other town official order or direct him to contact Laws with respect to her picture-taking or any other matter.

Officer Shannon's statement was similar to Bollinger's. He stated that on October 24, 1982, he went to Laws' residence in response to a call received by the Sheriff's Dispatch Office, not in response to any orders or directives from White. The neighbors complained that Laws was taking pictures of them as they went about their property, and they wanted her to stop. Shannon told Laws that she was harassing her neighbors and that she should cease taking pictures of them. Finally, like Bollinger, Shannon stated that, at the time he received the call, he was unaware of any lawsuit by Laws against the Town of Rockville, and that at no time did White or any town official order or direct him to contact Laws with respect to her picture-taking or any other matter.

In her response to White's motion for summary judgment,[1]

---

[1]Initially, Laws failed to respond to White's motion, and the district court granted summary judgment in favor of White. Laws successfully moved for relief from judgment under Rule 60(b), and the district court allowed her to respond to White's motion.

Laws included her own affidavit. In it, she stated that White was actively involved in town governance and that he was aware of her zoning suit. With regard to Officer Bollinger, she, stated that 1) although he told Laws that he received a complaint of her trespassing, the records of the dispatcher do not reflect any such complaint, 2) he questioned her about pictures she had taken of town equipment being used on a town official's private property, and 3) the pictures she took on August 16 show no people and show that she was on her own property when she took them. With regard to Officer Shannon, Laws stated that 1) the records of the dispatcher do not reflect any trespassing complaints or allegations for October 24, 1982, and 2) that he was listed as a witness for her neighbors in a case in which they filed against the Board of zoning Appeals.

In opposition to White's motion for summary judgment, Laws argued that one could rationally infer that White had directed Bollinger and Shannon to harass her in retaliation for her involvement in town affairs, including her efforts to get the zoning laws enforced. The district court rejected this argument, stating that "this inference is not strong enough to rebut the sworn statements of White and officers Bollinger and Shannon that White did not, in any way, direct the officers to order Laws not to take pictures." R. Doc. 35, at 3. The district court granted summary judgment in favor of White. Laws appeals.

II

We review a grant of summary judgment *de novo*. We view the record and all reasonable inferences drawn from it in the light most favorable to the non-moving party. *Fiorenzo v. Nolan*, 965 F.2d 348, 350 (7th Cir. 1992). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Laws sued White in both his individual capacity and in his official capacity as chief of police and Trustee of the Town Board

of Rockville. The distinction determines what the plaintiff must prove:

> [T]o establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. More is required of an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a " 'moving force' " behind the deprivation; thus, in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law.

Kentucky v. Graham, 473 U.S. 159, 166 (1985) (emphasis in original) (citations omitted).

We turn first to Laws' individual-capacity suit. Laws does not claim that White personally harassed her or that a failure on his part to supervise the officers caused the harassment.[2] Instead, she claims that he bears responsibility because he directed the officers to harass her in retaliation for her zoning suit. The evidence uniformly contradicts this claim. White supported his motion for summary judgment with his own affidavit and those from the two officers. All three disavowed any communication or instructions from White to the officers regarding Laws. Although we view the record in the light most favorable to the non-moving party, we do not simply close our eyes to all evidence unfavorable to the non-movant. To resist a properly made motion for summary judgment, the adverse party

> may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

---

[2]Before the district court, Laws clearly alleged affirmative misconduct on White's part, variously describing his actions as "willful," "intentional," and "more than mere acquiescence."

Fed. R. Civ. P. 56(e). In this case, Laws has not come forward with any evidence controverting the sworn statements of White and the officers that White did not direct them to harass or otherwise contact Laws.

Laws attempts to liken this case to *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). In *Adickes*, the plaintiff, a white woman in the company of blacks, sued a restaurant, alleging that its refusal to serve her and her subsequent arrest were the product of a conspiracy with the police. The Supreme Court reversed a grant of summary judgment in favor of the restaurant because it failed "to foreclose the possibility that there was a policeman in the Kress store while petitioner was awaiting service, and that this policeman reached an understanding with some Kress employee that petitioner not be served." *Id.* at 157. Unlike Kress, however, White did show the absence of a genuine issue as to any material fact because the affidavits he submitted completely foreclosed the possibility that White was involved with the alleged harassment of Laws.

Laws attempts to salvage a genuine issue of material fact by arguing that the totality of the circumstances supports an inference that White did indeed direct the officers to harass Laws. The "inference" that Laws would have us draw amounts to mere speculation. Laws cites White's status as chief of police, his interest in the zoning litigation, his active involvement in Rockville government, and Laws' various conflicts with that government. Although not inconsistent with Laws' claim that White directed the officers to harass her, these facts would not enable a reasonable jury to return a verdict for Laws. *Anderson v. Liberty Lobby, Inc*,, 477 U.S. 242, 248 (1986). Thus, the district court properly granted summary judgment in favor of White in his individual capacity.

With regard to Laws' official-capacity suit, since there is no evidence connecting White to the alleged harassment, there is no basis upon which to conclude that the alleged harassment was part of an official "policy or custom." Thus, there can be no official capacity liability. *Graham*, 473 U.S. at 166. The district

court properly granted summary judgment to White in his official capacity.

III

For the foregoing reasons, the order of the district court granting summary judgment to White is AFFIRMED in all respects.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

BETTY ANN LAWS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	TH 86-208-C
	)	
ROCKVILLE TOWN BOARD OF TRUSTEES: DONALD C. SWAIM, RONALD D. MATTHEWS, WILLIAM D. BROWN, RICHARD DEPLANTY, and KENNETH NORMAN, in their official capacity as Trustees and individually; PAULA PETERSON, LARRY GOOCH, and MONTY BLACK, in their official capacity as Trustees only; STANLEY SKELTON, in his official capacity as Town Superintendent and Building Inspector and individually; ROCKVILLE BOARD OF ZONING APPEALS, in their official capacity as members of the Board of Zoning Appeals; and DEWEY WHITE, in his official capacity as Trustee of the Town Board of Rockville and as Chief of Police Department and individually,	)	
	)	
Defendants.	)	

SUMMARY JUDGMENT IN FAVOR OF DEFENDANT DEWEY WHITE

The court, having this day issued an Entry On Defendant

Dewey White's Fully Briefed Motion For Summary Judgment in the above-captioned cause of action, now therefore, in accordance therewith

ORDERS AND ADJUDGES that plaintiff Betty Ann Laws takes nothing by way of her complaint against defendant Dewey White. Finding no just reason for delay, this court enters judgment in favor of defendant Dewey White, and the cause of action is hereby DISMISSED as to defendant Dewey White.

ALL OF WHICH IS ORDERED this 30th day of May 1991.

John Daniel Tinder, Judge
United States District Court

Copies to:
Donald G. Orzeske
Kightlinger & Gray
Market Square Center
Suite 660
151 North Delaware Street
Indianapolis, IN 46204

Stephen P. Kenley
Kenley & Kenley
205 West High Street
Rockville, IN 47872

David D. Haynes
140 Cherry Street
Terre Haute, IN 47807

H. Andrew Sonneborn
Sharon L. Wright
Linder & Hollowell
615 Russell Avenue
P.O. Box 845
Indianapolis, IN 46206-0845

The Hon. William G. Hussmann, Jr.
United States Magistrate
Room 328, Federal Building
101 N.W. 7th Street
Evansville, Indiana 47708

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

BETTY ANN LAWS,

Plaintiff,

vs.) TH 86-208-C

ROCKVILLE TOWN BOARD OF TRUSTEES: DONALD C. SWAIM, RONALD D. MATTHEWS, WILLIAM D. BROWN, RICHARD DEPLANTY, and KENNETH NORMAN, in their official capacity as Trustees and individually; PAULA PETERSON, LARRY GOOCH, and MONTY BLACK, in their official capacity as Trustees only; STANLEY SKELTON, in his official capacity as Town Superintendent and Building Inspector and individually; ROCKVILLE BOARD OF ZONING APPEALS, in their official capacity as members of the Board of Zoning Appeals; and DEWEY WHITE, in his official capacity as Trustee of the Town Board of Rockville and as Chief of Police Department and individually,

Defendants.

ENTRY ON DEFENDANT DEWEY WHITE'S FULLY BRIEFED MOTION FOR SUMMARY JUDGMENT

This cause comes before the court on defendant Dewey White's Motion For Summary Judgment for a second time. On April 11, 1991, this court issued an order granting White's motion for summary judgment motion. The accompanying ent'ry noted that plaintiff Betty Ann Laws had not responded to the motion and then held that the plaintiff's evidence in the record was so deficient as to entitle defendant White to judgment as a matter of law. More specifically, this court held that Laws had not shown that a reasonable jury could find that the encounters with two police officers while Laws was taking pictures of her neighbors' property was a part of the alleged pattern of harassment by the Town of Rockville or by White individually. Subsequently, plaintiff's counsel sought relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) in order for plaintiff to respond to the summary judgment motion. This court granted the Motion For Relief From Judgment (FRCP 60(b)) on April 15, 1991, and the parties have now fully briefed the motion for summary judgment.

In response to White's motion for summary judgment, Laws argues that "strong inferences" can be made "from the relationship between the actions of the police officers and Dewey White's interest in Betty Laws [sic] case preparation." Based on this information, Laws argues that "a jury may find that Dewey White used his power as a public official to deter a citizen from taking lawful actions in her own interest" which raises a "single but genuine issue as to a material fact which allows the contentions against Dewey White to survive summary judgment." Laws goes on to cite, in her responsive brief as well as in her attached affidavit, White's extensive involvement in local government, including areas of government about which Laws actively complained, and the sequence of events that allegedly supports the inference that White was harassing the plaintiff through the use of his position as chief of Police.

This court holds, however, that this inference is not strong enough to rebut the sworn statements of White and officers Bollinger and Shannon that White did not, in any way, direct the officers to order Laws not to take pictures. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-54 (1986) (a court determines "not whether . . . the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented"). Laws simply has not produced any additional relevant evidence[1] in her response that this court did not consider in the April 11, 1991, entry and order granting summary judgment.

The plaintiff cites to cases that stand for the proposition that a local government entity may be liable under 42 U.S.C. § 1983 when the government's policies or customs causally relate to the violation of one's constitutional rights. *See Pembaur v. City of Cincinnati*, 475 U.S 469 (1986); *Wolf-Lillie v. Sonquist*, 699 F.2d 864 (7th Cir. 1983); *Mayes v. Elrod*, 470 F. Supp. 1188 (N.D. Ill. 1979). In this case, however, the plaintiff has still failed to present sufficient evidence to show that defendant White directed or was otherwise personally involved in Bollinger's and Shannon's actions of which Laws complains. There is insufficient evidence to link Bollinger's and Shannon's actions to an alleged "official custom" that resulted in a pattern of harassment.

Therefore, this court holds, based on the reasons stated above as well as the reasons stated in this court's April 11, 1991 entry, that defendant Dewey White is entitled to summary

---

[1]The plaintiff attached to her responsive brief a portion of a transcript from a Rockville Town Board Meeting on February 18, 1986 to show that Laws and White were in attendance; copies of pages from the police dispatcher's log to show there was no complaint of a "trespass"; and copies of three photographs of her neighbors' property to show she was not trespassing when the pictures were taken. The defendant objects, for good reason, as to the authenticity of these attachments; however, even considering this "evidence," this court does not find that it provides the sufficient link to show that Dewey White was involved in, knew about, or was indifferent to the actions of his officers.

judgment as a matter of law. An accompanying order will enter summary judgment against plaintiff Laws and for defendant White.

Dated this 30th day of May 1991.

John Daniel Tinder, Judge
United State District Court

Copies to:
Donald G. Orzeske
Kightlinger & Gray
Market Square center
Suite 660
151 North Delaware street
Indianapolis, IN 46204

Stephen P. Kenley
Kenley & Kenley
205 West High Street
Rockville, IN 47872

David D. Haynes
140 Cherry Street
Terre Haute, IN 47807

H. Andrew Sonneborn
Sharon L. Wright
Linder & Hollowell
615 Russell Avenue
P.O. Box 845
Indianapolis, IN 46206-0845

The Hon. William G. Hussmann, Jr.
United States Magistrate
Room 328, Federal Building
101 N.W. 7th Street
Evansville, Indiana 47708

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

BETTY ANN LAWS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	TH 86-208-C
	)	
ROCKVILLE TOWN BOARD OF TRUSTEES: DONALD C. SWAIM, RONALD D. MATTHEWS, WILLIAM D. BROWN, RICHARD DEPLANTY, and KENNETH NORMAN, in their official capacity as Trustees and individually; PAULA PETERSON, LARRY GOOCH, and MONTY BLACK, in their official capacity as Trustees only; STANLEY SKELTON, in his official capacity as Town Superintendent and Building Inspector and individually; ROCKVILLE BOARD OF ZONING APPEALS, in their official capacity as members of the Board of Zoning Appeals; and DEWEY WHITE, in his official capacity as Trustee of the Town Board of Rockville and as Chief of Police Department and individually,	)	
	)	
Defendants.	)	

ENTRY ON DEFENDANT DEWEY WHITE'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

This cause comes before the court on defendant Dewey

White's Motion for Summary Judgment filed July 16, 1990. Plaintiff Betty Ann Laws has failed to respond; thus, this motion is ripe for a ruling.[1] This court has jurisdiction over this cause pursuant to 28 U.S.C. § 1343(3) and (4).

Plaintiff Laws filed this cause of action under 42 U.S.C. § 1983 on June 2, 1986, seeking declaratory and injunctive relief and compensatory and punitive damages from various officials in Rockville, who allegedly violated her rights under the first and fourteenth amendments to the United States Constitution. more specifically, plaintiff alleged that her persistence in trying to get local officials to acknowledge a zoning problem resulted in an unconstitutional pattern of harassment and retaliation against her by the defendants. Counsel, on behalf of all of the defendants, filed a motion for summary judgment, and this court issued an Entry Granting In Part And Denying In Part The Defendants' Motion For Summary Judgment on April 24, 1990. Essentially, the entry held that Laws had sufficiently stated a constitutional violation under section 1983 by alleging that a campaign of harassment was directed toward her because she exercised her first amendment rights — even if each separate incident did not rise to the level of a constitutional violation. However, the entry granted summary judgment as to two of the alleged incidents because the plaintiff failed to show that such incidents were a part of the pattern of harassment that caused her alleged constitutional depriva-

---

[1]Defendant White requests a hearing on this motion, which this court DENIES. While Federal Rule of Civil Procedure 56(c) does refer to a "hearing" in reference to a motion for summary judgment, an oral argument is not necessarily required before a court rules on such a motion. *Grigoleit Co. v. Local No. 270*, 769 F.2d 434, 437-38 (7th Cir. 1985). Given this court's ruling on the motion, it is doubtful that defendant White will be disappointed by the denial of a hearing.

tion.[2] Defendant White, who is sued in his official capacity as a Rockville Town Board Trustee and Police Chief, as well as in his individual capacity, subsequently submitted a separate Motion for Summary Judgment.

II. Factual Background

The April 24, 1990, Entry set forth, at length, the factual allegations in this lawsuit. Thus, there is no need to repeat the facts except to the extent that they are pertinent to defendant White's motion.

According to the second amended complaint, Laws was a resident and property owner in Rockville for eleven years during which she had several discordant encounters with local officials involving their application and enforcement of various ordinances and health codes. The genesis of the problem began in 1979 when the plaintiff began to complain to the President of the Zoning Board and the Building Inspector about zoning violations on two lots that were adjacent to the plaintiff's property. *See Laws v. Lee*, 471 N.E.2d 1229, 1231 (Ind. App. 1984). Finally, in 1981 the plaintiff filed a lawsuit in state court over the zoning dispute. The trial judge dismissed the suit because Laws had failed to exhaust her administrative remedies. Laws then presented her complaints to the Board of Zoning Appeals, which concluded that her neighbors were not in violation of the ordinance. Laws went back to the trial court, suing, among others, the members of the Rockville Board of Trustees, which included Dewey White.[3] The trial court agreed with the Zoning Board. Id. The Indiana Court of Appeals, however, reversed the trial court in December 1984 in favor of Laws. *Id.* at 1235.

---

[2]The two incidents that do not support the plaintiff's theory that the defendants' were engaged in a pattern of harassment against her in violation of her constitutional rights regard the draining and filling of the plaintiff's septic tank and remarks made at a Public Service Commission hearing. *See* April 24, 1990, Entry at 12-15. Defendant White, who was Chief of Police at the time, was not directly linked to these two incidents.

[3]Defendant White resigned as Trustee on or about April 12, 1982.

Because of the town officials' unresponsiveness to her complaints for over two years and because she had to hire an attorney to pursue her complaints through the legal process, the plaintiff contends in her deposition that her constitutional rights were violated. Furthermore, the plaintiff alleges that her persistence in trying to get the local officials to acknowledge the zoning problem resulted in an unconstitutional pattern of harassment and retaliation against her by the defendants that continued until the filing of this section 1983 cause of action.

With respect to defendant White's alleged involvement, the plaintiff testified in her deposition that in two separate incidents during the pendency of the state court zoning litigation, police officers Charles Bollinger[4] and Jack Shannon told her to cease taking photographs of trailers on her neighbors' property, which she was doing to document her allegations of zoning violations. The first encounter took place on August 16, 1982, and the second encounter was on October 24, 1982. Both officers were in uniform and in marked police cars when they approached the plaintiff, and both officers were responding to complaints from the neighbors. The plaintiff acknowledges that she continued to take all of the pictures that she wanted in each instance and that neither officer did anything to stop her. The plaintiff alleges that defendant Dewey White, who was then Chief of Police, was responsible for the alleged harassment by these officers. The plaintiff alleges that because White had been a defendent in the state court zoning litigation in his former position as a Trustee, he was now using his power as Chief of Police to retaliate against her for the previous litigation. These are the only incidents in which the plaintiff alleges that White was involved. By the plaintiff's own deposition testimony, all of the other incidents, of which Laws complains, had no connection with the police department or involvement by White.

---

[4]There seems to be some confusion as to whether "Bollinger" is "Bolinger" is the correct spelling. Based on Charles Bollinger's signature on his affidavit, which itself is not very clear, this court will spell his name with two l's.

In support of the motion for summary judgment, White submitted affidavits from Bollinger and Shannon regarding the encounter with Laws. Bollinger stated that he did go to Laws's residence on August 16, 1982, in response to a call that was received through the Sheriff's Dispatcher's Office. The neighbors complained that Laws was standing in their yard, taking pictures of them. A group of persons at the neighbor's residence threatened to hurt Laws if she did not stop. Officer Bollinger told those persons to go home, and then he told Laws that if she was on the neighbors' property taking pictures of them over their objections, she was trespassing. He did not threaten to file any charges. Bollinger stated that when he received the complaint on August 16, 1982, he was not aware of any lawsuit by Laws against the Town of Rockville. Furthermore, he was not ordered or directed by Police Chief White to contact Laws relating to either her taking of photographs or any other matter.

Officer Shannon similarly stated that he responded to a call made to the Sheriff's Dispatcher's Office on October 24, 1982, in which the same neighbors complained that Laws was taking pictures of them when they went out of their house or when they passed by a window. Shannon approached Laws, and she told him that she was taking pictures for evidence in a lawsuit. Shannon told Laws that taking pictures of people in their backyard was harassment, that he did not see how such pictures could be related to any lawsuit, and that she should cease taking pictures of her neighbors' activities while they were on their own property. He did not threaten to file charges against Laws. Shannon also stated that he was not aware of any lawsuit by Law against Rockville when he responded to the call on October 24, 1982, and that at no time did Police Chief White, nor any other official, order or direct Shannon to contact Laws regarding her taking of photographs or any other matter.

Defendant White also submitted his own affidavit in support of his motion for summary judgment to which he swore that he "did not at any time give any directives or orders to Officer

Charles Bolinger or Officer Jack Shannon, nor any other law enforcement officer for the Town of Rockville, that they should contact or confer with Plaintiff Betty Ann Laws to order her to cease taking pictures for evidence in any lawsuit, or for any other purpose, or to discuss same with Plaintiff Betty Ann Laws." White stated that he only learned, after the fact, about Bollinger's and Shannon's encounters with Laws during the normal course of their duties as police officers.

III. Standard of Review

As noted above, the plaintiff did not respond to defendant White's motion for summary judgment and submission of affidavits. The local rule that sets forth the time schedule for briefing a summary judgment motion states that "[f]ailure to file an answer brief or reply brief within the time prescribed shall subject the motion to summary ruling." S.D. Ind. R. 9(a). With regard to determining whether material facts are controverted, the local rules provide, in part, as follows:

> In determining the motion for summary judgment, the court will assume that the facts as claimed by the moving party are admitted to exist without controversy, except as and to the extent that such facts are actually in good faith controverted in the "statement of genuine issues" filed in opposition to the motion, as supported by the depositions, answers to interrogatories, admissions, and affidavits on file.

S.D. Ind. R. 11.

These local rules, however, must be juxtaposed against the backdrop of Federal of Civil Procedure 56, which provides, in part, as follows:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, sum-

> mary judgment, *if appropriate*, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e) (emphasis added). Thus, this court may not automatically grant summary judgment in favor of the movant because the opposing party has failed to respond; rather, I must first determine whether summary judgment is "appropriate." To the extent that the moving party has the burden of proof on any of the relevant issues, then this court must determine that "the facts specified in or in connection with the motion entitle the moving party to judgment as matter of law." To the extent that the moving party does not have the burden of proof on any of the relevant issues, then this court must determine that "the deficiencies in the opponent's evidence designated in or in connection with the motion entitle the moving party to judgment as a matter of law." *Anchorage Assocs. v. Virgin Islands Bd. of Tax Rev.*, 922 F.2d 168, 175 (3rd Cir. 1990); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

IV. Discussion

A. Statute of Limitations

The defendant argues that the applicable two year statute of limitations, *see Bailey v. Faulkner*, 765 F.2d 102, 103 (7th Cir. 1985); *Movement for Opportunity & Equality v. General Motors Corp.*, 622 F.2d 1235 (7th Cir. 1980), bars the plaintiff's claim against him. It is true that the two incidents regarding Bollinger and Shannon occurred in August 1982 and October 1982, respectively, and the plaintiff did not file this cause of action until June 2, 1986 — over three years later. However, the plaintiff complains of a continuing pattern of harassment and retaliation, of which these two incidents were allegedly just a part. It is a general principle that the statute of limitations does not begin to run on a continuing wrong until the wrong is "over and done with." *Tavlor v. Meirick*, 712 F.2d 1112, 1118 (7th Cir. 1983); *cf. Hill v. Trustees of Indiana Univ.*, 537 F.2d 248, 254 (7th Cir. 1976) (plaintiff's claims accrued at the time of the last overt act attributable to the defendant, which was outside of

the section 1983 statute of limitations). Thus, as long as the final act in the alleged pattern of unconstitutional harassment and retaliation occurred within the two year period of limitations, earlier acts are not necessarily barred because they occurred prior to June 2, 1984.

B. Merits of Section 1983 Claim

The defendant argues that the plaintiff has not alleged a deprivation of a right secured by the United States Constitution or laws because she has no clearly established constitutional or statutory right to photograph activities that occur on her neighbors' private property over their objections. Further, the defendant argues that even if Laws has a secured right to photograph such activities, defendant White, in his individual capacity, is protected by qualified immunity.[5]

In the April 24, 1990 Entry, this court analogized Laws's claim to the claims in *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982). In *Bart*, the plaintiff alleged that the mayor, who was the plaintiff's direct supervisor, orchestrated a campaign of petty harassments against her in violation of her first amendment rights. The campaign included such things as baseless reprimands and holding her up to ridicule for bringing a birthday cake to the office for a co-worker. *Id.* at 624. While the Seventh Circuit recognized that "a certain air of the ridiculous hangs over the harassment allegations," the court went on to hold that it was a question of fact whether the harassment was substantial enough to reach the threshold of actionability under section 1983. *Id.* at 625. This court also recognized that each separate incident alleged by Laws may not rise to the level of a constitutional violation, but her allegations of a campaign of harassment directed toward her because she exercised her first amendment rights of free speech or the right to petition the government was sufficient to allege a constitutional deprivation under section 1983. April 24, 1990 Entry, at 11.

---

[5]Bollinger and Shannon are not defendants in this lawsuit.

The defendant tries to distinguish *Bart* from this case because in *Bart* the alleged pattern of harassment was perpetrated under the direction of a single arm of the government. The defendant states that *Bart* did not address a situation, such as this case, where a plaintiff alleges that a separate arm of government entitled to qualified immunity may be held to have participated in the unconstitutional pattern of harassment. This court does not find the defendant's argument persuasive. If a plaintiff sufficiently alleges a pattern of harassment by a person acting under color of state law[6] that a reasonable fact finder could find to be a constitutional deprivation, then she has simply alleged a prima facie claim under section 1983. The defendant still has available any and all affirmative defenses, such as qualified immunity. Thus, a Chief of Police who is sued in his individual capacity and is alleged to be engaged in such a pattern of harassment may show that he is immune if a reasonably well-trained police officer could believe that such conduct did not violate a clearly established right. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Simply because a defendant in a section 1983 may be able to assert qualified or absolute immunity does not bar the plaintiff from stating a cause of action based upon the facts stated in *Bart* or in this case.

Whether the plaintiff has a constitutional right to photograph her neighbors in the privacy of their own backyard and the further questions of whether the plaintiff can prove that an official policy or custom caused this deprivation or whether defendant White, in his individual capacity, is qualifiedly immune from suit are questions that this court need not, and prudently should not, reach. Based upon the uncontroverted facts, this court holds that the plaintiff has failed to show that these two incidents were part of the alleged campaign of harassment.

---

[6]The defendants in this case do not contest that they were acting under color of state law.

In order to prove that defendant White, in his official capacity as Chief of Police, is liable under section 1983,[7] the plaintiff has to show that there was a local government official policy or custom that is a cause in fact of her constitutional deprivation. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). Respondeat superior cannot be used against local governmental entities because section 1983 requires a causal relation between the conduct of the person and the constitutional deprivation.

The defendant has met his initial burden of showing the absence of a genuine issue of material fact regarding the plaintiff's allegations that Bollinger and Shannon, under the direction of White, told her to stop photographing her neighbors in violation of her first and fourteenth amendment rights. *See Celotex Corp.*, 477 U.S. at 323. As discussed above, Bollinger, Shannon, and White submitted affidavits swearing that White did not direct or even know at the time that the officers responded to a complaint about Laws's picture-taking. Bollinger and Shannon stated that they were simply responding to citizens' complaints received by the dispatcher, of which White had no direct or indirect involvement.

---

[7]The plaintiff sued White in his official capacity as a Trustee, as well as Chief of Police. An official capacity suit is really a suit against the governmental entity, e.g., the Town of Rockville in this case. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *Pennington v. Hobson*, 719 F. Supp. 760, 772-73 (S.D. Ind. 1989). White resigned has Trustee in April 1982, and thus, white in his official capacity as a Trustee of the Town Board of Rockville is no longer a proper party in this action.

While it is not clear from the plaintiff's complaint whether White is sued in his individual capacity as a Trustee, as well as Police Chief, there is insufficient evidence to support a theory that while White was a Trustee, he deprived the plaintiff of her constitutional rights in his individual capacity. This court reads the complaint and record to allege that the plaintiff's cause of action against White, individually, is solely for his actions as Police Chief, which were allegedly in retaliation for Laws's earlier state court suit against White when he was a Trustee.

Because the plaintiff did not respond to the defendant's motion, this court must determine if the plaintiff's evidence in the record is so deficient as to entitle the movant to judgment as a matter of law. *See Anchorage Assocs.*, 922 F.2d at 175. In this case, the plaintiff must prove her claims by a preponderance of the evidence. Viewing the evidence based upon the plaintiff's burden of proof, this court must determine "not whether . . . the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-254 (1986). In this case, the plaintiff has not met her burden of showing that a genuine issue of material fact exists that could cause a "fair-minded jury" to return a verdict against White, in his official or individual capacity, and for the plaintiff based on the encounters between Laws, Bollinger and Shannon.[8] In other words, Laws has not shown that a reasonable jury could find that the encounters with the police officers were a part of the alleged pattern of harassment by the Town of Rockville or by White individually. Thus, this court holds that there are no genuine issues of material fact regarding the picture-taking incidents and that as

[8]The defendant states that since there is no evidence to show that White was personally or directly involved in the alleged constitutional violation, then any individual liability of White "must necessarily be predicated upon a breach of his duty as supervisor to control the activities of his deputy officers." The defendant goes on to argue that since "the conduct of the two officers was legal and not a violation of Plaintiff's constitutional rights," White can have no liability for failure to disapprove of his officers' actions. This court agrees with the defendant that the plaintiff has not shown sufficient evidence for a reasonable juror to find supervisory liability, but not because the underlying conduct by the subordinates was not unconstitutional. Rather, for supervisory liability to attach, the supervisor "must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what [he] might see. [He] must in other words act either knowingly or with deliberate, reckless indifference." *Jones v. City of Chicago*, 856 F.2d 985, 992-93 (7th Cir. 1988).

In this case, the plaintiff simply has not presented sufficient evidence for a reasonable jury to conclude that White knew about, approved, or was so indifferent to the officers' conduct that he is liable for the underlying conduct, even assuming such conduct did contribute to a constitutional violation.

a matter of law, the plaintiff has failed to show that these two incidents were a cause in fact of her alleged constitutional deprivation. This court will grant summary judgment, by an accompanying order, for defendant White as to these allegations. Since these were the only two incidents in which defendant White was alleged to have participated, this court's entry of summary judgment will completely relieve defendant Dewey White from defending this section 1983 cause of action brought by plaintiff Laws.

Dated this 11th day of April 1991.

John Daniel Tinder, Judge
United States Distrcit Court

Copies to:
Donald G. Orzeske
Kightlinger & Gray
Market Square Center
Suite 660
151 North Delaware Street
Indianapolis, IN 46204

Stephen P. Kenley
Kenley & Kenley
205 West High Street
Rockville, IN 47872

David D. Haynes
140 Cherry Street
Terre Haute, IN 47807

H. Andrew Sonneborn
Sharon L. Wright
Linder & Hollowell
615 Russell Avenue
P.O. Box 845
Indianapolis, IN 46206-0845

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

BETTY ANN LAWS,

Plaintiff,

vs.

TH 86-208-C

ROCKVILLE TOWN BOARD OF TRUSTEES: DONALD C. SWAIM, RONALD D. MATTHEWS, WILLIAM D. BROWN, RICHARD DEPLANTY, and KENNETH NORMAN, in their official capacity as Trustees and individually; PAULA PETERSON, LARRY GOOCH, and MONTY BLACK, in their official capacity as Trustees only; STANLEY SKELTON, in his official capacity as Town Superintendent and Building Inspector and individually; ROCKVILLE BOARD OF ZONING APPEALS, in their official capacity as members of the Board of Zoning Appeals; and DEWEY WHITE, in his official capacity as Trustee of the Town Board of Rockville and as Chief of Police Department and individually,

Defendants.

ENTRY GRANTING IN PART AND DENYING IN PART THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the court on the defendants' motion for summary judgment. The plaintiff Betty Ann Laws has brought this cause of action under 42 U.S.C. § 1983 seeking declaratory and injunctive relief and compensatory and punitive damages from various officials in Rockville who allegedly violated her rights under the first and fourteenth amendments to the United States Constitution. This court has jurisdiction over this cause pursuant to 28 U.S.C. § 1343(3) and (4).

I. Standard of Review

Summary judgment, pursuant to Federal Rule of Civil Procedure 56, is properly granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In making this determination, this court views the record in the light most favorable to the party opposing the motion. *See Morgan v. Harris Trust & Sav. Bank*, 867 F.2d 1023, 1026 (7th Cir. 1989) (per curiam). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. The non-moving party must then " 'set forth specific facts showing that there is a genuine issue for trial.' " *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)). "[A]t the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. A court must enter summary judgment against the non-moving party if, after adequate time for discovery, the party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. "In such a situation, there can be 'no

genuine issue as to any material fact', since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 322-23.

Furthermore, a factual dispute must be outcome determinative to preclude summary judgment. *Donald v. Polk County,* 836 F.2d 376, 379 (7th Cir. 1988). Thus, the mere assertion of a factual dispute cannot defeat the motion for summary judgment. *Anderson,* 477 U.S. at 247-48.

II. Background

According to the second amended complaint, Betty Ann Laws was a resident and property owner in Rockville, Indiana, for eleven years during which she had several discordant encounters with local officials involving their application and enforcement of various ordinances and health codes. The genesis of the problem began in 1979 when the plaintiff began to complain to the President of the Zoning Board and the Building Inspector about zoning violations on two lots that were adjacent to the plaintiff's property. *See Laws v. Lee,* 471 N.E.2d 1229, 1231 (Ind. App. 1984). Finally, in 1981 the plaintiff filed a lawsuit in state court over the zoning dispute. The trial judge dismissed the suit because Laws had failed to exhaust her administrative remedies. Laws then presented her complaints to the Board of Zoning Appeals, which concluded that her neighbors were not in violation of the ordinance. Laws went back to the trial court, which agreed with the Zoning Board. *Id.* The Indiana Court of Appeals, however, reversed the trial court in 1983. *Id.* at 1235. Because of the town officials' unresponsiveness to her complaints for over two years and because she had to hire an attorney to pursue her complaints through the legal process, the plaintiff contends in her deposition that her constitutional rights were violated. Furthermore, the plaintiff alleges that her persistence in trying to get the local officials to acknowledge the zoning problem resulted in an unconstitutional pattern of harassment and retaliation against her by the defendants that continued until the filing of this

section 1983 cause of action. The plaintiff cites several examples of this alleged harassment, which are set forth below.

The plaintiff testified in her deposition that in two separate incidents during the pendency of the zoning litigation, police officers Charles Bollinger and Jack Shannon told her to cease taking photographs of her neighbors' property, which she was doing to document her allegations of zoning violations. The plaintiff alleges that defendant Dewey White, who was then Chief of Police, was responsible for the alleged harassment by these officers. Defendant White had been a defendant in the zoning litigation in hisformer position as a Trustee, and thus, the plaintiff allegesthat he was retaliating against her because of this litigation.The plaintiff acknowledges, however, that she continued to take all of the pictures that she wanted in each instance and that neither officer did anything to stop her.

During this same time period in 1982, the plaintiff alleges that she received a letter from the attorney for Rockville, who is not a defendant in this lawsuit, insisting that she remove her flower bed because it was on a utility easement. The plaintiff alleges in her deposition that defendant Skelton requested that the attorney send the letter. She bases her allegation of Skelton's involvement on the fact that he was the Town Superintendent, that he received a copy of the letter, and that he complained about the garden at a later time. The plaintiff did not remove the flower bed, and there were no further complaints from local officials.

Also in 1982, the water utility operated by the Rockville Town Board requested a rate increase, and a Public Service Commission hearing was held at which the plaintiff presented her views against the increase. The plaintiff alleges that during the hearing Rockville's attorney, who is not a defendant in this lawsuit, implied that she was raising complaints in an attempt "to get even" with the town for enforcing the zoning ordinances. Specifically, the plaintiff alleges that the town attorney stated that she was having a feud with the town and Skelton. The plaintiff admitted, however, in her deposition that none of

the defendants in this lawsuit were present at the Public Service Commission hearing.

In another matter, Rockville provided sewer hook-ups to the property owners on Primrose Drive, which was where the plaintiff lived. Sometime after the new sewer system was available in 1984, the plaintiff received a letter addressed to "Utility Customer" from defendant Skelton, then Rockville Superintendent, stating that a town ordinance required property owners to drain and fill septic tanks. The plaintiff testified in her deposition that she knew of only one other person who had received such a letter. The plaintiff did not understand the first letter and did not do anything to her septic tank until she received a second letter from the Town Board requiring her to comply with the septic tank ordinance within sixty days. Eventually, the plaintiff complied with the ordinance, but alleges that she was the only property owner on Primrose Drive who had complied as of the time of the filing of this lawsuit. She requested information from the Town Board to determine whether her neighbors had also complied with the ordinance. According to her deposition, however, the Town Board responded by stating that it had notified the property owners of the ordinance, but it did not state whether any of the property owners had complied. The plaintiff states that she did not ask her neighbors, but that she had not witnessed any of the large trucks (or tire tracks from such trucks) that are used to drain the sewage from the septic tanks at any of her neighbors' houses.

In March of 1984, the plaintiff was told that defendant Skelton had received a complaint from the Indiana State Board of Health regarding a stagnant pond on the plaintiff's property. The plaintiff contended that the problem was caused by a town storm sewer that was piped into the east end of the pond. The plaintiff testified in her deposition that the town agreed to open an outlet so that the pond could drain if Laws would sign a release of liability against the town. She refused to sign the release. Laws alleges that because of her refusal, defendant

Skelton threatened at a Town Board meeting to have her property condemned.

The plaintiff refers in her deposition to other alleged occurrences between her and town officials that she believes were also part of the pattern of harassment. For example, she testifies about drainage onto her property from a neighboring septic tank and the town's alleged refusal to adequately pave and restore Primrose Drive after the installation of the new sewer system. Both of these problems were eventually remedied, but the plaintiff cites them as further examples of the pattern of harassment against her because of the town's slow response to her complaints about these matters. These problems were not included in the complaint or the motion for summary judgment, but were raised by the plaintiff in her deposition. Nonetheless, because of the plaintiff's efforts to eliminate what she believed was inefficient local government, she alleges that the defendants' actions cited above were intended to harass and retaliate against her and that this was a violation of her constitutional rights.

III. Discussion

The plaintiff's action is brought pursuant to section 1983, which provides a cause of action to redress the violation of federally-secured rights, privileges or immunities by a person or governmental body acting under color of state law. Bell *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984). Section 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Colum-

bia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

A person seeking to state a claim under section 1983 must establish two essential elements: (1) the deprivation of a right secured by the Constitution and the laws of the United States; and (2) the person or persons who caused the alleged deprivation were acting under color of state law. *E.g. Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970); *Gilbreath v. East Arkansas Planning & Dev. Dist., Inc.*, 471 F. Supp. 912, 921 (E.D. Ark. 1979).

Thus, the first inquiry in every section 1983 case is whether there has been the deprivation of a right secured by the constitution or statutes of the United States. *Baker v. McCollan*, 443 U.S. 137, 140 (1979). "[T]he starting point in an analysis of a Section 1983 claim is the isolation of the specific federal right that plaintiff claims defendant violated when acting under color of state law." *Jackson v. Byrne*, 738 F.2d 1443, 1445-46 (7th Cir. 1984).

In this case, the plaintiff argues that her first and fourteenth amendment rights were violated. The defendants discuss each incident separately and argue that none of them resulted in the violation of the plaintiff's constitutional rights. In the Plaintiff's Response and Brief in opposition to Motion for Summary Judgment, she argues that her constitutional rights were violated by "the cumulative nature of the actions and attitudes of the various arms of the government of the Town of Rockville. She does not contend that a certain, isolated, event is to serve as the basis for her claim under Sec. 1983, but the consideration of all of these individual incidents, a consideration of the whole and not the sum of the parts, gives rise to a clear indication that the practices and policies of the town government in Rockville were to make life as difficult as possible for Betty Ann Laws."

In *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982), the plaintiff took a leave of absence from her job with the city to run for

mayor. After she lost the race, she returned to her job where she was under the direct supervision of the mayor, who had not been a candidate for re-election, but was still in office. The plaintiff alleged that the mayor orchestrated a campaign of petty harassments designed to punish her for having run for public office. The campaign included such things as baseless reprimands and holding her up to ridicule for bringing a birthday cake to the office for a co-worker's birthday. *Id.* at 624. The Seventh Circuit wrote as follows:

> It is true that a certain air of the ridiculous hangs over the harassment allegations, in particular the allegation . . . regarding the birthday cake. But we cannot say as a matter of law that the exercise of First Amendment rights by public employees cannot be deterred by subjecting employees who exercise them to harassment and ridicule through selective enforcement of work rules. The effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable. Yet even in the field of constitutional torts *de minimis non curat lex*. Section 1983 is a tort statute. A tort to be actionable requires injury. It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise — that if the Mayor of Springfield had frowned at Miss Bart for running for public office he would be liable for damages (unprovable, of course) under section 1983. However, more is alleged here — an entire campaign of harassment which though trivial in detail may have been substantial in gross. It is a question of fact whether the campaign reached the threshold of actionability under section 1983.

Id. at 625 (citations omitted).

This case is analogous to *Bart*. Laws's allegation that a campaign of harassment was directed toward her because she exercised her first amendment rights of free speech or the right to petition the government sufficiently alleges a constitu-

tional deprivation under section 1983 even if each separate incident does no rise to the level of a constitutional violation.

Having determined that the plaintiff has alleged a deprivation of a constitutional violation, this court must next address whether the defendants caused the alleged deprivation and were acting under color of state law. The defendants do not contest that they were not acting under color of state law; instead, they argue that even assuming that there was a constitutional deprivation, not all of the defendants were involved in all of the incidents and cannot be held liable for the actions of others. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the United States Supreme Court held that cities and counties are section 1983 persons. However, there is a significant condition of section 1983 local government liability: there must be a local government official policy or custom that is a cause in fact of the plaintiff's constitutional deprivation. Respondeat superior cannot be used against local governmental entities because section 1983 requires a causal relation between the conduct of the person and the constitutional deprivation.

The plaintiff has cited a number of incidents, and this court must determine if she has sufficiently alleged that each of them was a part of the defendants' alleged campaign of harassment. Of course, this court views the record in the light most favorable to the plaintiff, who is opposing the motion for summary judgment. *See Morgan*, 867 F.2d at 1026. Thus, the defendants have the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. The plaintiff must then "'set forth specific facts showing that there is a genuine issue for trial.'" *Anderson*, 477 U.S. at 250 (quoting Fed. R. Civ. P. 56(e)).

The defendants have met their initial burden of showing the absence of a genuine issue of material fact regarding the plaintiff's allegation that the septic tank ordinance was enforced against her as a part of the campaign to harass her in violation of her first and fourteenth amendment rights. As discussed

above, the plaintiff received a letter addressed to "Utility Customer" from defendant Skelton, then Rockville Superintendent, stating that a town ordinance required property owners to drain and fill septic tanks. The plaintiff testified in her deposition that she knew of only one other person who had received such a letter. Eventually, the plaintiff complied with the ordinance, but alleges that she was the only property owner on Primrose Drive who had complied as of the time of the filing of this lawsuit. The defendants submitted an affidavit from Sheryl Michael, Rockville Deputy Clerk Treasurer since 1983, who stated that letters requesting compliance with the ordinance were sent to the four home owners affected by the Primrose Drive sewer extension, including Laws. Michael further states that according to the town records, three of the four home owners paid the sewer connection fee and had their sewer and septic system inspected. The plaintiff states in her deposition that she did not ask her neighbors if they had complied with the ordinance, but that she had not witnessed any of the large trucks (or tire tracks from such trucks) that are used to drain the septic tanks at any of her neighbors' houses.

In a case, such as this, where the plaintiff must prove her case by a preponderance of the evidence, the judge "must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson*, 470 U.S. at 252. Thus, the trial judge "must view the evidence presented through the prism of the substantive evidentiary burden." *Id.* at 254. In this case, the plaintiff has not met her burden of showing that a genuine issue of material fact exists that could cause a "fair-minded jury" to return a verdict for her with regard to the septic tank incident. In other words, Laws has not shown that the letters to her regarding her compliance with the septic tank ordinance were a part of the alleged pattern of harassment. Her only evidence that her neighbors did not comply with the ordinance was her own deposition in which she asserted that she had not heard or seen evidence of the trucks. She could have deposed or

obtained affidavits from her neighbors about whether they received similar letters from the town and whether they complied with the ordinance, but she acknowledges in the deposition that she did not ask her neighbors these questions. Similarly, there is no evidence to show that the tire tracks of these trucks would have been clearly detectable regardless of the location of the septic tank, (e.g., near a roadway or in the middle of a yard), the condition of the yard, (e.g., whether it was muddy dry, etc.), or the steps taken after the truck left to repair any damage done to the yard, (e.g., filling in any ruts left by the truck). Furthermore, there is no expert evidence to establish whether these trucks are necessary to drain septic tanks or whether there are other methods. The plaintiff cannot expect a reasonable juror or this court to conclude on such thin evidence that the letter that she received addressed to "Utility Customer" and the subsequent related events were targeted toward her and part of an overall plan to harass her. Thus, this court holds that there are no genuine issues of material fact regarding the septic tank incident and that as a matter of law, the plaintiff has failed to show that this incident was a cause in fact of her alleged constitutional deprivation. This court will grant summary judgment for the defendants as to this allegation.

In another incident during a Public Service Commission hearing, the plaintiff alleges that Rockville's attorney, who is not a defendant in this lawsuit, implied that she was raising complaints in an attempt "to get even" with the town for enforcing the zoning ordinances. The plaintiff admitted in her deposition that none of the defendants in this lawsuit were present at the Public Service Commission hearing. She does not present sufficient evidence to link this incident with any of the defendants, and thus, she cannot use this incident to show a pattern of harassment by these defendants. This court will grant summary judgment as to this incident.

The plaintiff's allegations regarding the remaining incidents are sufficient to raise a question of material fact whether the

incidents were part of a pattern intended to harass the plaintiff and whether the pattern, if any, was the result of a municipal policy or custom. *See Powe v. City of Chicago*, 664 F.2d 639, 651 (7th Cir. 1981) (stating that the allegation of a pattern of conduct or a series of acts violative of constitutional rights will in many cases raise an inference of municipal policy).

The defendants also argue that this court should grant summary judgment in favor of those defendants who are named in their individual capacity. They seem to argue that a person acting in an individual capacity cannot be acting under color of state law. Clearly, this is not the law. An official may be sued in his or her individual capacity — for examply, there are numerous cases in which a section 1983 action is allowed against an official personally to which qualified immunity is applicable.[1] *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (discussing the test for qualified immunity); *Clay v. Conlee*, 815 F.2d 1164 (8th Cir. 1987) (discussing the difference between supervisory liability, which is personal liability, and official capacity liability, which is local government liability requiring proof of an official policy or custom). Thus, this court will deny the motion for summary judgment as to those defendants who are sued in their individual capacity.

Finally, the defendants argue that since the plaintiff no longer lives in Rockville, her request for an injunction is moot. The plaintiff, however, states in her response that she still owns property in Rockville. Thus, this court finds that since many of her allegations center around the use of her property and that she is still obligated to comply with Rockville's various ordinances, her request for injunctive relief is not moot. The defendants' motion for summary judgment will be denied as to this issue.

In summary, this court will grant in part the defendants' motion for summary judgment with respect to the plaintiff's

---

[1]However, the defendants do not raise qualified immunity as an affirmative defense in their answer.

allegations regarding the draining and filling of the plaintiff's septic tank and the Public Service Commission hearing. These two incidents, as described above, do not support the plaintiff's policy or custom, in a pattern of harassment against her in violation of her first and fourteenth amendment rights. The plaintiff may rely on the remaining incidents to establish such an official policy or custom against these defendants.

Dated this 24th day of April 1990.

John Daniel Tinder, Judge
United States District Court

Copies to:

Donald G. Orzeske
Kightlinger & Gray
Market Square Center
Suite 660
151 North Delaware Street
Indianapolis, IN 46204

Stephen P. Kenley
Kenley & Kenley
205 West High Street
Rockville, IN 47872

David D. Haynes
140 Cherry Street
Terre Haute, IN 47807

H. Andrew Sonneborn
Linder & Hollowell
615 Russell Avenue
P.O. Box 845
Indianapolis, IN 46206-08452